No. 76726-2

SANDERS, J. (dissenting)—While the majority recognizes the First Amendment implicit right of free association creates at least a qualified privilege against pretrial discovery on associational matters, it refuses to enforce a similar privilege emanating from our state constitutional right to privacy, Wash. Const. art. I, § 7. I cannot understand the reason for the distinction, and the majority doesn't tell us.

If anything article I, section 7 is more directly related to pretrial discovery than is the First Amendment:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Const. art. I, § 7.

This text plainly requires us to question whether the requested discovery implicates one's "private affairs" and, if so, whether it is compelled under "authority of law." On the other hand, the majority's recognition of a First Amendment qualified privilege against discovery requires much more judicial footwork:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a

redress of grievances.

U.S. Const. amend. I.

Although construing the First Amendment to create a qualified privilege against disclosure of associational matters may well be implicit, it is certainly not explicit. Nevertheless we recognized it, and applied it, in *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990).

The majority's discussion of CR 26(b)(1) is somewhat beside the point as this rule on its face provides no authority to obtain discovery of a privileged matter ("Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter . . . .") (emphasis added).

The nub of the majority's analysis of whether or not article I, section 7 creates a privilege of nondisclosure follows:

> That the *Snedigar* balancing test applies to a *privilege* asserted by a party resisting a discovery request—and was, in fact, derived from cases defining privileges against compliance with discovery requests—is of considerable significance in determining whether a trial court must use the *Snedigar* balancing test when a party resists disclosure by asserting, not a particular statutory, common law, or constitutional *privilege*, but a general right to privacy under article I, section 7.

Majority at 15.

It is stupefying to hold that there is at least a qualified privilege against disclosure created by the First Amendment while dismissing the much more pertinent and explicit text of article I, section 7 as "but a general right to privacy

under article I, section 7." *Id*. at 15. Article I, section 7 is as much a part of our state constitution as the First Amendment is part of its federal counterpart, and there is even more reason to protect a broad or "general right" to privacy than a narrow one. I suggest a more searching and principled approach to the problem will further illuminate the majority's shortcomings.

I.

Article I, Section 7 Provides Citizens Broad Protections From Unreasonable Interference

It is evident from the constitutional text, framers intent, and case law expounding it, article I, section 7 indeed provides *broad* protections to the people of our state.

"Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997). Under this well-established principle of constitutional interpretation we are bound by the broad language in article I, section 7 declaring that "private affairs" are entitled to protection, and must give full effect to that constitutional mandate.

Our framers stated the standard for interpreting our constitution is the constitution itself. Article I, section 29 provides: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Mr. Justice Joseph Story articulated the proper approach to

constitutional interpretation:

> In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them, the people must be supposed to read them, with the help of common-sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.

1 Joseph Story, Commentaries on the Constitution of the United States § 451, at 322 (Little Brown & Co. ed., 3d ed. 1858) (quoted in *Malyon*, 131 Wn.2d at 799 n.31).

A. Intent of Washington Constitution Framers

It is also our fundamental rule of constitutional interpretation that courts are "to look to the right as it existed at the time of the constitution's adoption in 1889." *Sofie v. Fibreboard Corp*., 112 Wn.2d 636, 645, 771 P.2d 711 (1989); *see also City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (affirming right to jury trial in municipal court because "[f]rom the earliest history of this state, the right of trial by jury has been treasured"). At the constitutional convention in 1889 some delegates proposed Washington adopt language identical to the Fourth Amendment. The Journal of the Washington

State Constitutional Convention, 1889, at 497 (Beverly Paulik Rosenow ed., 1962). However, the Founders expressly *rejected* this language, instead "the convention adopted a strikingly different provision that does not expressly refer to searches, seizures, and warrants but does emphasize the individual's privacy rights." Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 20-21 (2002).

Our Founding Fathers recognized one's privacy deserved heightened protection exceeding the Fourth Amendment, favoring a broader constitutional directive *explicitly* protecting our citizens' private affairs; whereas the United States Constitution never even mentions privacy. So doing, the framers created a "broad and inclusive privacy protection." *See, e.g.*, Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 520 (1986). Contemporaneous accounts describe the framers of article I, section 7 as having made private affairs "sacred." The Journal of the Washington State Constitutional Convention, 1889, *supra*, at 497 n.14.

The framers recognized the basic principle that the right to privacy is among the most fundamental of all rights to protect what Justice Brandeis famously stated nearly a century ago, "[T]he right to be let alone [is] the most

comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

B. Washington Precedent is Consistent with the Framers' Intent

We approvingly cited Justice Brandeis when recognizing "the overriding necessity for the protection of privacy interests in certain governmental contexts—such as those involved in discovery proceedings." *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 240, 242, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). Further, we declared over 25 years ago that article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980).

Since then the great weight of Washington appellate authority has favored giving full meaning to article I, section 7's express textual mandate that "private affairs" shall be protected against unwarranted intrusion, whatever the source. *See, e.g., State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004) (recognizing "Washington's long-standing tradition of affording great protection to individual privacy"); *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) ("It is now settled that article I, section 7 is more protective than the Fourth Amendment."); *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d

46 (2002) ("It is now well settled that the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment . . . ."); *State v. Ladson*, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999) ("Article I, section 7, is explicitly broader than that of the Fourth Amendment as it 'clearly recognizes an individual's right to privacy with no express limitations' and places greater emphasis on privacy.") (quoting *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (footnote and internal quotation marks omitted)); *State v. Bradley*, 105 Wn. App. 30, 36, 18 P.3d 602, 27 P.3d 613 (2001) (article I, section 7 "provides greater protection to an individual's right of privacy than the Fourth Amendment").

In sum, it is clearly evident from the text, framers intent, and resulting precedent, article I, section 7 provides broad protection to citizens of this state, and we must apply it accordingly.

II.

Does Disclosure in this Case Invoke "Private Affairs"?

To determine whether Washington's broad constitutional protection of privacy is infringed in *this* case, the court must determine whether the information contained within the ineligible volunteer files falls within the ambit of article I, section 7's "private affairs" protection. If so, at least the *Snedigar* balancing test should be employed to protect privacy, as it has been used to

protect free association.

A. The Ineligible Volunteer Files System

To assist local scouting programs to avoid using volunteers who do not meet Scouting standards, the Boy Scouts of America (BSA) at its inception implemented a system to maintain files on individuals who may not meet those standards. Clerk's Papers (CP) at 76-77, ¶ 3. While many of the ineligible volunteer files concern individuals accused of committing sexual abuse, they are also maintained for individuals accused of other indiscretions (e.g., physical assault, theft, alcohol/drug abuse). CP at 54. Ineligible volunteer files are sometimes generated from unsubstantiated rumors, hearsay, or news items. CP at 77, ¶ 3. The BSA often has no actual knowledge of whether an alleged violation occurred. *Id.* BSA estimates that it has control over approximately 10,000 ineligible volunteer files at present. CP at 680 n.2.

BSA's director of registration has the duty to safeguard and maintain the ineligible volunteer files system. CP at 77. BSA's director of registration recognizes the sensitive nature of the files and declared:

> BSA considers the information in the Ineligible Volunteer Files to be confidential, both with regard to persons outside of BSA as well as with regard to persons inside the organization. BSA recognizes the sensitive nature of the information within these files, and a file is only made available to persons within the organization on a need-to-know basis . . . .

CP at 77-78, ¶ 8.

B. Information Contained in the Ineligible Volunteer Files Are "Private Affairs" Under Article I, Section 7

The only nationally reported decision dealing with the production of ineligible volunteer files involved facts nearly identical to the present case—claims of sexual molestation by BSA scoutmasters: *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12 (2000). Because California's Constitution is textually less demanding than Washington's,[1] a consistent analysis would certainly conclude that we should afford privacy rights under our text no less protection than California affords under its constitution.

Although *Juarez* provides persuasive legal analysis regarding the same issue as the instant case, the majority fails to address, distinguish, and/or dismiss *Juarez* in any manner whatsoever.

In 1996 Mario Juarez sued BSA, the San Francisco Bay Area Council, and the Mary Help of Christians Church of the Roman Catholic Diocese of Oakland, seeking damages for sexual molestation committed by Jorge Francisco Paz, Juarez's scoutmaster. *Juarez*, 81 Cal. App. 4th at 384.

[1] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. art. I, § 1.

During discovery BSA produced the ineligible volunteer file for Paz after Juarez's allegations came to light. *Id.* at 390-91. Juarez, however, sought discovery of *all* BSA ineligible volunteer files for persons accused of sexual misconduct. BSA sought a protective order, arguing that the ineligible volunteer files were protected by the state constitutional right of privacy, and no compelling need had been shown for the discovery of the files, which were of dubious relevance at best to Juarez's claims. In response the court appointed a referee to conduct an in camera review of certain ineligible volunteer files to determine the discoverability of such files. After reviewing a redacted sample, the referee concluded "'these files contain private information and are the type of files that are subject to protection by the right of privacy.'" *Id.* at 391.

On appeal Juarez never disputed that the information contained in the ineligible volunteer files fell manifestly within the constitutionally protected area of privacy. Juarez wisely avoided that argument because, as the court stated,

> [S]uch an argument would be futile. Clearly, these files relate to the most *private affairs* of various individuals unrelated to this litigation and were maintained in strictest confidence by the Scouts. Because the requested material is constitutionally protected, *the ordinary yardstick for discoverability*, i.e., that the information sought may lead to relevant evidence, *is inapplicable*.

Id. at 391-92 (emphasis added).

Juarez held contents of the ineligible volunteer files contain private information confidentially maintained and is therefore protected by the constitutional provisions of the state constitution. *Juarez* is directly on point.

In addition to the persuasive authority of *Juarez*, Washington case law holds "'[W]hat is voluntarily exposed to the general public' is not considered part of a person's private affairs," *State v. Goucher*, 124 Wn.2d 778, 784, 881 P.2d 210 (1994) (quoting *Young*, 123 Wn.2d at 182). Conversely, what is withheld from the public is private. *State v. Clark*, 129 Wn.2d 211, 227, 916 P.2d 384 (1996). These confidential files contain reports of possible violations of scouting standards, including sexual abuse of minors by adults. These reports also contain information about victims, alleged perpetrators, witnesses, and reporters. Such information is exactly the type of information the framers of article I, section 7 intended to protect from unreasonable intrusions. If this isn't "private," what is?

C. Fidelity to the Constitution's Text Requires that Article I, Section 7's Express Protection of Private Affairs Must Be Held Paramount to Newly Established Discovery Rules

Washington's constitution means today what it meant in 1889. *Sofie*, 112 Wn.2d at 645. Our constitutional protection of private affairs has existed for over 100 years, much longer than pretrial discovery. Pretrial discovery is a "relatively recent innovation" which is traceable to the Federal Rules of Civil

Procedure adopted in 1938 nearly 50 years after the Washington Constitution was ratified. Bryan P. Harnetiaux et al., *Harnessing Adversariness in Discovery Responses: A Proposal for Measuring the Duty to Disclose After* Physicians Insurance Exchange & Ass'n v. Fisons Corporation, 29 Gonz. L. Rev. 499, 508 (1994). *See* Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 Clev. St. L. Rev. 17, 20 (1988) (undertaking historical analysis of roots of modern discovery).

Washington adopted its current system in 1967 patterned on the federal model. See Adoption of Civil Rules for Superior Court, 71 Wn.2d xxii - xxv (1967); see also, Harnetiaux, 29 Gonz. L. Rev. at 508.[2] At common law discovery was very limited and did not include the wide-ranging discovery rules like the newly created CR 26:

> At common law opportunities for discovery were limited, as a result of which it was often said that trials were conducted "by ambush." Propounding interrogatories and obtaining documents were not authorized. Some discovery was allowed in equity, but it did not come into its full flower until the promulgation of the federal rules and the adoption of these rules by the states. It is not disputed that without CR 26 the petitioners would have no right of access to the information which they claim a constitutional right to

[2] *Compare State v. Smith*, 150 Wn.2d 135, 154, 75 P.3d 934 (2003) (no right to prove prior convictions to a jury under habitual offender statute; statute not adopted until 1903, "well after the Washington Constitution was adopted"), *with Richmond v. Thompson*, 130 Wn.2d 368, 381, 922 P.2d 1343 (1996) (petition clause in article I, section 4 does not limit defamation actions; civil liability for defamation was well established in 1889).

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Rhinehart, 98 Wn.2d at 231-32 (citations omitted).

Similarly, in *John Doe v. Puget Sound Blood Center,* 117 Wn.2d 772, 819 P.2d 370 (1991), in response to Justice Dore's dissent claiming "privacy rights must give way at times to the greater societal good of providing civil redress," our majority reaffirmed:

> The dissent asserts that once a plaintiff meets "the requirements of CR 26(b)(1) (relevance and nonprivileged subject matter), the issue of privacy drops out of the case as a matter of law." Dissent[at 789]. The dissent misses the entire point. *The right of privacy would make the matter privileged.*

Id. 789, App. (emphasis added).

Here, the majority misses the same point. The right to private affairs makes the matter privileged. Consistently, CR 26 precludes discovery of constitutionally privileged matters.

D. Since the Ineligible Volunteer Files Information Is Constitutionally Protected, at Minimum the Trial Court Should Have Applied the *Snedigar* Test

A literalist approach to the constitution might entirely bar the discovery as it appears to be an absolute prohibition against disturbing one in his private affairs except under "authority of law." Modern cases hold that authority of law is a warrant. For example, in *Ladson*, 138 Wn.2d at 348-49, we held:

> Article I, section 7, is explicitly broader than that of the Fourth Amendment as it "'clearly recognizes an individual's right to privacy with no express limitations'" and places greater emphasis on privacy. *State v.*

> *Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Further, while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, *article I, section 7, holds the line by pegging the constitutional standard to "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant*." *State v. Myrick*, 102 Wn.2d [506,] 511 [, 688 P.2d 151 (1984)].

Ladson, 138 Wn.2d at 348-49 (emphasis added) (footnote and one citation omitted. "The warrant requirement is especially important under article I, section 7, of the Washington Constitution as it is the warrant which provides the 'authority of law' referenced therein." *Id.* at 350. *See also State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). ("Article I, section 7 provides: 'No person shall be disturbed in his private affairs, or his home invaded, without authority of law.'"); *Bosteder v. City of Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (2005) (citing *City of Seattle v. McCready*, 123 Wn.2d 260, 270, 868 P.2d 134 (1994) for the rule that "warrants issued in the absence of statute or court rule authorization 'cannot serve as the authority of law for a governmental disturbance of an individual's private affairs'"). *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) ("As a general rule, warrantless searches and seizures are per se unreasonable. However, there are a few 'jealously and carefully drawn exceptions' to the warrant requirement, including consent.") (citation omitted) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996)).

But there was no warrant here. Moreover, there is no basis to believe that the Founding Fathers envisioned pretrial discovery initialed by a party opponent "authority of law" since (1) such a procedure did not exist at the time the constitution was ratified and (2) authority of law by its nature must come from a lawful authority, not just any litigant who requests discovery. *Sofie*, 112 Wn.2d at 645; *see also Mace*, 98 Wn.2d at 99. Accordingly "authority of law" in this context must at least be a court order affirmatively directing discovery, not one just denying a protective order. And at minimum such an affirmative order should not issue absent satisfaction of the *Snedigar* test.

Both the federal courts and this court have recognized the First Amendment limits civil discovery of information central to associational freedom, such as the membership lists of private associations. *See Snedigar*, 114 Wn.2d 153; *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981) (*vacated sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982) (mootness)). The constitutional right to privacy is not a poor cousin to the First Amendment. It deserves the same level of scrutiny and protection during civil litigation as any other constitutional right.

E. Application of *Snedigar*

Snedigar sets forth a three-part balancing test to determine whether an asserted First Amendment associational privilege (or in this case an article I,

section 7 privacy privilege) would protect information from civil discovery requests.

First, the party asserting the privilege must make an initial showing that there is some probability that the disclosure would impinge on the right. *See Snedigar*, 114 Wn.2d at 159.

Second, once that showing of privilege is made, the burden shifts to the party seeking discovery not only to establish the relevance and materiality of the information sought, but also to make a showing that reasonable efforts to obtain the information by other means have been unsuccessful. *Id.* at 165. At this second step, "the interest in disclosure will be regarded as relatively weak unless the information goes to the 'heart of the matter', or is crucial to the case of litigant seeking discovery." *Id*. "'Mere speculation that information might be useful will not suffice.'" *Id*. (quoting *Black Panther Party*, 661 F.2d at 1268).

Third, if the moving party can establish that the interest in the disclosure goes to the "heart of the matter" or is crucial, then the trial court balances the parties' competing claims of privilege and need, *Snedigar*, 114 Wn.2d 153, and only orders disclosure if truly necessary. Although this is ultimately the task of the trial court, that court might consider some of the following factors:

1. Impingement Upon Private Affairs of BSA

Arguably, BSA has a strong institutional interest in protecting the integrity of the ineligible volunteer files system because it depends upon the assurance of confidentiality given to report sources. If persons with knowledge of abuse believe these files will be revealed containing their reports to BSA, they may be less likely to come forward. *See Farnsworth v. Procter & Gamble Co*., 758 F.2d 1545, 1546 (11th Cir. 1985). The ability of BSA to assist literally thousands of local community sponsors across the country to avoid appointment of volunteers who do not meet scouting standards may be threatened by the trial court's order. These files are still "private" by nature, even after redactions.

2. Plaintiffs Cannot Satisfy Shifting Burden

If the BSA shows "some harm," the burden then shifts to the plaintiffs "to establish the relevancy and materiality of the information sought, and to make a showing that reasonable efforts to obtain the information by other means have been unsuccessful." *Snedigar*, 114 Wn.2d at 164. Regarding relevancy, we cautioned in *Snedigar*:

> [T]he interest in disclosure will be regarded as relatively weak unless the information goes to the "heart of the matter", or is crucial to the case of litigant seeking discovery. As the District of Columbia Circuit Court of Appeals has pointed out:
>
> > Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity.

Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Cir. 1981)

> *vacated mem. sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982) (mootness).

Id. at 165 (footnote omitted).

Nor arguably was any evidence offered to establish how the ineligible volunteer files go to the "heart of the matter" or are "crucial" to plaintiffs' case. None of these files has anything to do with the alleged incident which is the subject matter of this claim, nor with the individuals involved. It is collateral at best. Plaintiffs have already obtained 1,900 of some 10,000 ineligible volunteer files and after review cannot offer anything more than speculation that the contents of the remaining ineligible volunteer files might somehow be supportive of their claims. Moreover, the information plaintiffs seek is not discoverable if it may be obtained from other sources. *Cf. Hickman v. Taylor*, 329 U.S. 495, 513, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (opposing party not entitled to work product when the information is available from other sources). Such an inquiry is therefore appropriate as well.

3. The Trial Court Failed To Balance the Respective Interests

Even treating T.S.'s claims as sufficient to satisfy *Snedigar*'s highly particularized showing requirements, the superior court still must balance plaintiffs' asserted need against the constitutionally protected private affairs "and determine which [was] the strongest." *Snedigar*, 114 Wn.2d at 166. But no balancing took place here. An order was issued denying most files

protection and compelling production. The failure to balance is itself a manifest abuse of discretion.

The trial court's protective measures—redaction of names—arguably will not insulate an erroneous order to compel. *Eugster v. City of Spokane*, 121Wn. App. 799, 809, 91 P.3d 117 (2004), *review denied*, 153 Wn.2d 1012 (2005). *Eugster* affirmed a trial court's order quashing a subpoena duces tecum seeking information protected by the First Amendment. It held production of the documents would have a "potential chilling effect" on the subpoenaed party's First Amendment rights, and a protective order allowing the subpoenaed party to designate documents "confidential" under a protective order would not be enough to overcome this chilling effect. *Id*.

I would recognize article I, section 7's mandate to protect our private affairs applies to litigation discovery and remand to the trial court to apply the *Snedigar* test.

Therefore I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice James M. Johnson